SERVED: February 16, 1994

NTSB Order No. EA-4080

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. GARY B. WHEELER, Respondent.	Docket SE-11950

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, rendered on June 8, 1992, at the conclusion of a hearing on the issue of sanction only.[1] The law judge upheld an order of the Administrator

[1]An excerpt from the hearing transcript containing the initial decision is attached.
Because respondent did not reply to the charges in the Administrator's complaint, the law judge deemed the charges admitted and granted the Administrator's motion to hold the hearing on sanction only.

suspending the respondent's private pilot certificate for 180 days on allegations that he had violated sections 91.79(a) and (b), and 91.9 (now 91.119 and 91.13) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).[2] For the reasons discussed below, we will affirm that decision.

The suspension order, which served as the complaint, was dated May 24, 1991. It stated that:

> 2. On or about August 17, 1989, you operated civil aircraft N8043C, a Piper PA-28, the property of another, on a flight in the vicinity of Bowling Green, Kentucky.
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> 3. During the course of the above flight you made several low passes over a congested area, specifically the Pearce Ford Tower at Western Kentucky University, Bowling Green, Kentucky, at an altitude of approximately 600 feet.[3]

Respondent, who did not personally attend the hearing but was represented by counsel there, contends on appeal from the law

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[2]The regulations read, in pertinent part:

> **§ 91.79 Minimum safe altitudes; general.**
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
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> **§ 91.9 Careless or reckless operation.**
> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]According to testimony at the hearing, the tower was about 300 feet high.

judge's decision that his rights were violated because he was not given an opportunity to prepare a defense before, or to be heard at, the hearing. To understand respondent's position, a brief review of the sequence of events following the service of the suspension order is necessary.

Respondent, through an attorney, filed a notice of appeal on June 12, 1991, from the Administrator's order. The Administrator then filed a complaint, dated June 18, 1991, to which respondent not only did not file a timely answer, but never replied at all.[4] On April 6, 1992, respondent and his attorney were notified that a hearing had been scheduled for June 8, 1992.[5] On April 10, 1992, the Administrator filed a motion for judgment on the pleadings or for hearing on sanction only, based upon respondent's failure to file an answer. On April 13, 1992, another attorney entered an appearance on respondent's behalf.

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[4]Section 821.31(c) of the Board's rules, 49 CFR Part 821, requires the respondent to file an answer to the Administrator's complaint within 20 days of service. This section reads, in pertinent part:

> Answer to complaint. The respondent shall file an answer to the complaint within 20 days of service of the complaint upon him by the Administrator. Failure to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. Respondent's answer shall also include any affirmative defense that respondent intends to raise at the hearing. A respondent may amend his answer to include any affirmative defense in accordance with the requirements of § 821.12(a). In the discretion of the law judge, any affirmative defense not so pleaded may be deemed waived.

[5]The Board's rules of practice require 30 days' notice. See Section 821.37, 49 CFR Part 821.

That attorney, on June 4, more than a month after the time for filing an answer to the Administrator's motions had expired, filed a statement in opposition to them.[6] The law judge deemed respondent's failure to answer the complaint as an admission of its allegations.[7] He therefore granted the Administrator's motion to limit the hearing to the issue of sanction.

At the hearing respondent's attorney indicated that he had been retained by respondent's mother because respondent was stationed in Germany, serving in the United States Army, and could not be present for the hearing. He also indicated that he had not met with respondent to discuss the case and had come into the case late. At the conclusion of the hearing on sanction, the law judge affirmed the 180-day suspension.

Respondent initiated the appeals process by filing a notice of appeal with the NTSB Office of Law Judges on June 12, 1991, almost a year before the hearing was held, clearly an ample amount of time in which to prepare a defense. He therefore

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[6]By letter dated April 22, 1992, this attorney, Mr. Herman Bradley, had earlier requested a six-month continuance. According to a handwritten note in the case file signed by the law judge and dated April 28th, the law judge told Mr. Bradley in a telephone conversation, "no continuances." The record contains no information concerning a withdrawal by respondent's first attorney of record.

[7]One of the arguments respondent raises on appeal is that the Administrator failed to prove the allegations of the complaint by a preponderance of the evidence. However, since the charges were deemed by the law judge to have been admitted by respondent's failure to answer the complaint, see 49 C.F.R. § 821.31(c), and respondent has not demonstrated, or even argued, that the law judge erred in so ruling, he is not free on appeal to challenge the sufficiency of the evidence to support the charges against him.

cannot reasonably argue that he was not given sufficient time to defend against the charges because his second attorney may have had only two months to prepare for the hearing once it was scheduled.[8] Rather, we think these circumstances show that respondent had adequate time to prepare, but that the time available for preparing a defense was not put to good use. In any event, he has not shown an abuse of discretion in the law judge's refusal to postpone the matter.

Although respondent was represented by counsel at the hearing, and has identified no reason why his attorney could not adequately represent his interests on the matter of sanction in his absence, he argues that his opportunity to be heard was abridged. This argument fares no better than his first, for it too is an attack on the validity of the law judge's refusal to indefinitely continue the case until such time as respondent made known when he could be personally present at a hearing. Once again, we find no abuse in the law judge's ruling. It does not appear that the respondent had advised the Board that his military service abroad, or any other factor, might present a problem for scheduling a hearing, and, of course, the fact that respondent may have been on military duty in Germany did not, in

[8]Respondent's second attorney, who had almost two months' notice of the hearing, does not indicate what efforts he made, if any, after learning of the date for the hearing, to communicate with his client in order to prepare a defense. At the hearing, he called no witnesses and submitted no evidence. He makes no argument here that respondent could not have participated in the hearing via telephone, or that his deposition could not have been taken in time for submission at the hearing.

and of itself, establish that he could not have returned to the United States for attendance at the hearing on his appeal. Counsel presented no evidence on these matters or any others, and he offered no reason for respondent's failure to have answered the Administrator's charges during the year his appeal had been pending. On this record, the law judge could reasonably conclude that respondent had not exercised diligence to protect and preserve his appeal rights and that further delay in hearing the case so that he could be present had not been shown to be warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 180-day suspension of respondent's private pilot certificate shall begin 30 days after service of this order.[9]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[9]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).